IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 377 of 1992

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME-TAX

Versus

SIF STEEL LTD.

Appearance:

1. INCOME TAX REFERENCE No. 377 of 1992
MR MANISH R BHATT for Petitioner No. 1
NOTICE SERVED for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 03/02/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1 The following questions of law have been referred for the opinion of this Court by the Income Tax Appellate Tribunal, Ahmedabad Bench'B' under Section 256(2) of the Income Tax Act,1961 (the Act) at the instance of the Commissioner of Income Tax.

"[1] Whether,the appellate Tribunal has been right in law in holding that section 80 of the I.T.Act,1961 would be applicable in the instant case even though the return was filed not in pursuance to notice under section 139 but was filed in response to notice under sec.148 of the I.T.Act,1961 ?

[2] Whether, the language of section 80 permit carry forward of business loss on an assessment made pursuance to notice under sec.148 of the I.T.Act,1961?"

2 The assessment year is 1976-77 and the relevant accounting period is the calendar year ended on 31/12/1975. The assessee, a Limited Company was served with a notice under section 148 read with section 147(a) of the Act on 2nd January,1978. The said notice had been issued on 18th December,1977. Though the assessee company was required to file its return within a period of 30 days from the date of service, the return of income was actually filed on 1st September,1981 declaring loss of Rs.37,11,298/-. The Income Tax Officer finalized the assessment on 26th February,1982 under section 143(3) read with section 147(a) of the Act. He took the figure of Rs.43,60,232/- which was loss as per profit and loss account as the starting point of computation and ultimately determined total loss at Rs.36,15,954/-. The Income Tax Officer at the end of the assessment year held "loss is not to be carried forward in view of provisions of section 80 of the I.T. Act,1961".

3 The assessee carried the matter in appeal before CIT (Appeals), who vide his order dated 23rd February,1984 allowed the assessee's claim in relation to carry forward and set off of assessed loss. According to CIT (Appeals) section 148 of the Act requires the Income Tax Officer to serve a notice containing all or any of the requirements which may be included in a notice under section 139(2) of the Act, and hence, the present case should be regarded as one where the assessee has been

served with a notice having the same effect of a notice under section 139(2) of the Act. He further held that provision of section 139(3) of the Act will not apply. Since the loss had been determined by the Income Tax Officer in pursuance of a valid return in response to notice under section 148 read with section 139(2) of the Act, the Income Tax Officer had erred in law in holding that the loss determined in the assessment order could not be carried forward.

4 The revenue carried the matter in appeal before the Tribunal. The Tribunal upheld the findings recorded by the CIT (Appeals) and dismissed the appeal of the revenue by impugned order dated 6th February, 1985.

5 Heard Mr.M.R.Bhatt, learned Senior Standing Counsel for the applicant-revenue. Though served there is no appearance on behalf of the respondent-assessee.

6 It was submitted by Mr.Bhatt that return filed in pursuance of notice issued under section 148 of the Act can not be equated with a return filed under provisions of section 139 of the Act and hence, section 80 of the Act cannot be attracted. According to Mr.Bhatt, section 80 of the Act provided that only in case of a return filed under section 139 of the Act could the loss be determined and permitted to be carried forward and set off. That once it was established that the return had been filed in pursuance of notice under section 148 of the Act, even if a figure of loss was determined in the assessment order the same could not be permitted to be carried forward and set off. According to Mr.Bhatt the requirement stated in section 148(1) of the Act was that the notice issued under the said provision should contain all or any of the requirements which may be included in a notice under sub section (2) of section 139 of the Act, but that by itself did not mean that such notice under section 148(1) of the Act would be a notice under section 139(2) of the Act so as to entitle the assessee to claim benefit under section 80 of the Act.

7 The Tribunal and CIT (Appeals) have proceeded on the footing that once section 148(1) of the Act provides for notice issued under the said provision to contain all or any of the requirements which may be included in a notice under section 139(2) of the Act, there would be no material difference, and for all intents and purposes it would be a notice issued under section 139(2) of the Act. Thus, according to the Tribunal and CIT (Appeals), as a consequence, provisions of section 80 of the Act would get attracted and the loss determined in the assessment

would be available for being carried forward and set off in subsequent years. However, in the facts of the present case, it is not necessary to render any opinion on the said aspect of the matter for the reasons that follow hereinafter.

8 The assessment year is 1976-77 and the previous year is calendar year ended on 31/12/1975. Under section 139(3) of the Act a return of loss has to be furnished within time allowed under sub-section (1) of section 139 of the Act, or within such further time as may be extended by the Income Tax Officer. Section 139(1) of the Act stipulates that return of income in case of an assessee who has income from business or profession is to be filed before the expiry of four months from the end of the previous year or before 30th day of June of the assessment year, whichever is later. Therefore, in the present case the period of four months would expire on 30th April,1976, but 30th June,1976 being later in point of time, that date would be the outer limit within which the assessee could furnish a return under section 139(1) of the Act, and hence under section 139(3) of the Act.

8.1. Section 139(2) of the Act stipulates that in case of any person who, in the opinion of the Income Tax Officer, is assessable under the Act may be served with a notice under the said provision before the end of the relevant assessment year. Therefore, limit for serving a notice under this provision would be 31st March,1977, the assessment year being assessment year 1976-77.

9 In the present case admittedly, notice under section 148 of the Act was issued on 18th December,1977 and served on 2nd January,1978. Thus, it is apparent that the said notice was beyond the period of limitation prescribed under section 139(2) of the Act i.e. 31st March,1977. Once that is the case, it is not possible to hold that notice issued under section 148 of the Act was for all intents and purposes a notice issued under section 139(2) of the Act. In other words, even if the Income Tax Officer wanted to issue a notice under section 139(2) of the Act, he was prevented from doing so by virtue of limitation prescribed by the statute and for that reason also, notice under section 148(1) of the Act, in the facts of the present case, could not be equated with a notice under section 139(2) of the Act. The Tribunal and the CIT (Appeals) were therefore in error in holding that the assessment under section 147 of the Act could be considered to be an assessment after a notice under section 139(2) of the Act.

10 Hence, once it is found that the notice for furnishing return was not under section 139 of the Act, there is no question of assessee furnishing the return under section 139 of the Act. As already noticed hereinbefore, the prescribed period of limitation for filing return under section 139(3) read with section 139(1) of the Act had already expired. It is also necessary to note that even the limitation for furnishing a return under section 139(4) of the Act had expired in the present case. Therefore, in no event could the assessee claim that the return was filed under section 139 of the Act, as statutorily prescribed limitation under sub-sections (1), (2), (3) & (4) of Section 139 of the Act, had expired when the return was filed on 1st September,1981. Therefore, the assessee was not entitled to seek carryforward and set off of losses under section 80 of the Act.

11 In the result, both the questions referred to the Court for opinion are answered in favour of the revenue and against the assessee as aforesaid.

12 The reference stands disposed of accordingly. There shall be no order as to costs.

(D.A.Mehta, J)

(H.N.Devani,J)

m.m.bhatt